

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
AUGUST 7, 2003 Session

DEBORAH CLARK v. SUE RHEA d/b/a SURPRISE PARTIES

**Direct Appeal from the Chancery Court for Wilson County
No. 99488 C. K. Smith, Chancellor**

No. M2002-02717-COA-R3-CV - Filed January 13, 2004

This is a case involving the interpretation of a clause in a contract allowing for the recovery of attorney's fees upon the successful prosecution or defense of a breach of contract action. The Chancery Court awarded plaintiff attorney's fees pursuant to this clause. For the following reasons, we reverse.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

James C. Bradshaw, III, Klinton W. Alexander, Nashville, TN, for Appellant

David Day, Cookeville, TN, for Appellee

OPINION

Facts and Procedural History

On or about August 5, 1997, Debora Clark ("Clark") and Sue Rhea ("Rhea") as president of Surprise Parties, Co. ("Surprise Parties") entered into an independent contractor agreement containing a non-compete clause. The non-compete clause of the agreement stated:

for a period of 5 years after the termination of this agreement, unless otherwise specified in this agreement, [Clark] will not directly or indirectly engage in, or in any manner be connected with or employed by any person, firm, corporation, or other entity in competition with Surprise Parties, Co. or engaged in providing information to another company or individual within a 200 mile radius of any office, or representative of Surprise Parties, Co.

Though the parties attempted to negotiate whether or not this clause would be enforced against Clark, Clark ultimately terminated her contract with Surprise Parties, purchased merchandise substantially similar to Surprise Parties' merchandise from a different supplier, and sought to sell such merchandise in violation of the agreement. In addition, Clark filed a complaint on December 20, 1999, praying that the Chancery Court of Wilson County "declare that the 'non-competition' agreement contained in the Independent Contractor's Agreement void as being too broad and indefinite and terminate the entire contract" and "declare that Plaintiff is not in breach of the contract due to her promotion of her own party." After receiving a copy of Clark's complaint, counsel for Surprise Parties mailed a proposed agreed order declaring the non-compete clause at issue unenforceable, but Clark refused to sign this order because it did not award Clark her attorney's fees incurred until that point.

Over the next year, Clark's counsel attempted communication with Surprise Parties' counsel continuing to seek an agreed order from Surprise Parties that would award Clark her attorney's fees pursuant to the original contract of August 1997. In December 2000, Clark filed a motion for summary judgment seeking nullification of the contract between the parties and attorney's fees. After counsel for Clark agreed to a continuance, Surprise Parties, in February 2001, filed a response to Clark's motion for summary judgment, a cross-motion for summary judgment, and an answer to Clark's complaint. In its answer, Surprise Parties admitted that the non-compete clause contained in the agreement between the parties was unenforceable leaving the court to resolve only the issue of attorney's fees.

After the trial court denied the motions for summary judgment, a hearing was held on September 3, 2002. At the hearing, the parties stipulated the affidavits and documents in the record and requested the trial court base its ruling on those stipulated documents. In its final order, the trial court found the non-compete covenant unenforceable and awarded Clark her attorney's fees incurred up until the point Surprise Parties sent to her a proposed agreed order stating the non-compete covenant would be unenforceable. Defendant appealed the award to Clark for her attorney's fees and presents the following issues for our review:

- I. Whether the trial court erred when it awarded plaintiff her attorney's fees because this is a declaratory judgment action in which the question of breach or alleged breach of contract did not arise as a justiciable issue;
- II. Whether the trial court erred when it awarded plaintiff her attorney's fees because the plain language of the agreement does not recognize recovery of attorney's fees by a party that neither prosecutes nor defends against an action related to breach or alleged breach of the agreement.

For the following reasons, we reverse the award of attorney's fees.

Standard of Review

The interpretation of a contract is a matter of law requiring a *de novo* review on appeal. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Simonton v. Huff*, No. M1998-00493-COA-R3-CV, 1999 Tenn. App. LEXIS 831, at *8 (Tenn. Ct. App. December 17, 1999). As such, a presumption of correctness does not accompany the trial court's interpretation. *Guiliano*, 995 S.W.2d at 95; *Simonton*, 1999 Tenn. App. LEXIS 831, at *8. Though normally review of an award of attorney's fees is subject to an abuse of discretion standard, here the parties are contesting the trial court's interpretation and application of a contractual provision allowing for attorney's fees. This interpretation warrants *de novo* review and we address this issue first.

Law and Analysis

Appellant Surprise Parties contends that the plain language of the contract, which Surprise Parties drafted, does not allow Appellee Clark to recover her attorney's fees. The cardinal rule for interpreting contracts is to ascertain the intention of the parties and give effect to that intention. *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975) (citing *Petty v. Sloan*, 277 S.W.2d 355 (Tenn. 1955)). Where no ambiguity exists, this Court must attribute the ordinary meaning to the words used and neither party is to be favored in their construction. *Brown v. Tenn. Auto. Ins. Co.*, 237 S.W.2d 553, 554 (Tenn. 1951). This Court's duty is to enforce contracts according to their plain terms. *Bob Pearsall Motors*, 521 S.W.2d at 580 (citing *Eleogrammenos v. Standard Life Ins. Co.*, 149 S.W.2d 69 (Tenn. 1941)). However, where ambiguous, the language of a contract will be construed most strongly against the drafting party. See *Hanover Ins. Co. v. Haney*, 425 S.W.2d 590, 592-93 (Tenn. 1968).

In addition, Tennessee follows the "American Rule" that, in the absence of a contract, statute or recognized ground of equity, attorney's fees are not recoverable from the unsuccessful party in a lawsuit. *State ex rel. Orr v. Thomas*, 585 S.W.2d 606, 607 (Tenn. 1979) (citing *Deyerle v. Wright Mfg. Co.*, 496 F.2d 45 (6th Cir. 1974); *Carter v. Va. Sur. Co.*, 216 S.W.2d 324 (Tenn. 1948); *Raskind v. Raskind*, 325 S.W.2d 617 (Tenn. Ct. App. 1959); *Gillespie v. Fed. Compress & Warehouse Co.*, 265 S.W.2d 21 (Tenn. Ct. App. 1954)). When a contract provision provides for the recovery of attorney's fees from the unsuccessful party in the event litigation arises, the prevailing party is entitled to enforcement of the contract according to its express terms. *Wilson Mgmt. Co. v. Star Distribs. Co.*, 745 S.W.2d 870, 873 (Tenn. 1988); *Keehn v. Hosier v. Crye-Leike Commercial, Inc.*, No. M2000-01182-COA-R3-CV, 2001 Tenn. App. LEXIS 498, at *6-8 (Tenn. Ct. App. July 17, 2001). However, when a contract allocates responsibility for legal expenses, such obligation is limited only to those instances specified in the contract. *Boiler Supply Co., Inc. v. Lunn Real Estate Invs., Inc.*, No. 01A01-9605-CH-00246, 1998 Tenn. App. LEXIS 430, at *8-9 (Tenn. Ct. App. July 1, 1998) (citing *Chicago Southshore & S. Bend R.R. v. Irel Rail Corp.*, 658 N.E.2d 624, 634 (Ind. Ct. App. 1995)).

Appellant Surprise Parties argues that the provision in the agreement, allowing a party to recover attorney's fees in certain circumstances, does not apply. The provision in the agreement states in pertinent part:

In the event of any breach or alleged breach of this agreement, including breach of the covenant contained in #13 hereof, the prevailing party shall be entitled to recover all costs of prosecution or defense of any action arising hereunder, including reasonable attorney's fee.

After our review of the record including the contract at issue, we hold the trial court below erred when it interpreted this language in favor of Appellee Clark.

In this instance, Clark's complaint alleges her own breach of the contract and does not allege a breach by Surprise Parties or its representatives. Therefore, this situation falls within the first portion of the contract clause allowing for the recovery of attorney's fees "[i]n the event of any . . . alleged breach."

This Court also concedes that Clark falls within the traditional understanding of a "prevailing party," though she brought no breach of contract action but rather sought declaratory relief. Her cause of action was not for a breach of the contract for two reasons. First, she did not allege any breach of contract by Surprise Parties in her complaint. Second, though she did allege her own conduct could place her "in a position of alleged breach" of the contract, Clark could not bring a breach of contract action against herself. However, she may still be considered a "prevailing party" even though she sought declaratory relief only. Tennessee courts have defined "prevailing party" for purposes of attorney's fees clauses in contracts as "the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered." *Dairy Gold, Inc. v. Thomas*, No. E2001-02463-COA-R3-CV, 2002 Tenn. App. LEXIS 548, at *10 (Tenn. Ct. App. July 29, 2002) (quoting Black's Law Dictionary 1188 (6th ed. 1990)). In this case, Clark has essentially brought an action for declaratory relief seeking avoidance of the non-compete clause in the agreement. When Surprise Parties, in their answer, stated the non-compete clause was unenforceable, Clark succeeded on this issue which was the basis for her action. Therefore, Clark is a "prevailing party" for purposes of the attorney's fees clause of the agreement.

However, this Court does not find that Clark has successfully prosecuted a breach of contract or defended against an alleged breach of contract as the clause in the agreement contemplates. Clark is the only person against whom a breach may be attributed. At no point does Clark seek relief for any breach committed by Surprise Parties or its representatives. And because Clark cannot prosecute herself for her own alleged breach of contract, the only other avenue by which she can recover attorney's fees under this contract clause would be to defend her alleged breach against Surprise Parties. In these proceedings, Clark was not called upon to defend any alleged breach she may have committed because Surprise Parties filed no counter claim but rather admitted that the non-compete

clause was unenforceable. This Court interprets the attorney's fees clause to mean that a prevailing party may recover his or her attorney's fees by successfully prosecuting a breach of contract or successfully defending against an alleged breach of contract. Appellee Clark simply does not fall under either one of these circumstances. Therefore, we reverse the trial court's decision awarding attorney's fees to Clark. Because of the disposition of this issue, this Court need not address the additional issue of justiciability.

Conclusion

For the foregoing reasons, we reverse the trial court's award of attorney's fees. Costs are judged against Appellee, Debora Clark, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE